No. 2853

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The New York, New Haven & Hartford Railroad Company, a corporation; Boston & Maine Railroad, a corporation; Central New England Railway Company, a corporation; The New York Central & Hudson River Railroad Company, a corporation; The Michigan Central Railroad Company, a corporation; Erie Railroad Company, a corporation; Chicago & Erie Railroad Company, a corporation; The Canadian Pacific Railway Company, a corporation; The Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation; Spokane International Railway Company, a corporation; Chicago & Northwestern Railway Company, a corporation; The Chicago, Rock Island & Pacific Railway Company, a corporation, and J. M. Dickinson, as Receiver thereof; Boston & Albany Railroad Company, a corporation; Union Pacific Railroad Company, a corporation; Oregon Short Line Railroad Company, a corporation; Oregon-Washington Railroad & Navigation Company, a corporation, *Plaintiffs in Error,*

vs.

Ballou & Wright, a corporation,
Defendant in Error.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon

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OTHER AUTHORITIES

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THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, a corporation, et al,
Plaintiffs in Error,

vs.

BALLOU & WRIGHT, a corporation,
Defendant in Error.

Names and Addresses of the Attorneys of Record:

Mr. H. A. Scandrett, 58 East Washington Street, Chicago, Illinois.

Mr. Arthur C. Spencer and Mr. Charles E. Cochran, 510 Wells Fargo Building, Portland, Oregon, for the Plaintiffs in Error.

Mr. Will H. Bard, Pittock Building, Portland, Oregon, and Mr. James E. Fenton, Claus Spreckels Building, San Francisco, California, for the Defendant in Error.

STATEMENT OF THE CASE

This is an action, under Section 16 of the Act to regulate commerce as amended, to recover from the Railway Companies damages alleged to have been sustained by Ballou & Wright, consignee, and awarded by the Interstate Commerce Commission, by reason of the violation, by the Railway Companies, of the provisions of said Act against unjust and unreasonable rates and charges for the transportation of motorcycles.

In the years 1911, 1912 and 1913, Ballou & Wright, an Oregon corporation was engaged in the sale of motorcycles at Portland, Oregon. Between the 25th day of March, 1911, and January 1st, 1913, it shipped from Armory, Massachusetts, to Portland, Oregon, seven carloads of motorcycles, five carloads of which moved over the lines of the railways mentioned on page 13 of the record, one carload over the lines mentioned on page 35 and one carload over the lines mentioned on page 43, of the record. The aggregate weight of the shipments was 115,503 pounds and freight charges were collected in the sum of $4620.12, based upon a commodity rate of $4.00 per 100 pounds. Consignee contended that this commodity rate was unjust, unreasonable and excessive and on the 10th day of March, 1913, filed its complaint with the Interstate Commerce Commission against the Railway Companies in which it was alleged in substance that the commodity rate of $4.00 per 100 pounds, charged and collected by the Railway Companies, was unjust and unreasonable and in violation of said Act and that a just and reasonable rate applicable to motorcycles would be not to exceed $2.50 per 100 pounds with a 10,000 pounds carload minimum, and prayed that after a hearing and investigation by the Commission that an order be made requiring the Railway Companies to cease and desist

from the said violation of said Act and establish and put in force and apply as maximum in the future to the transportation of motorcycles in carloads between Armory, Massachusetts, and Portland, Oregon, in lieu of said commodity rate of $4.00 per 100 pounds, a rate of $2.50 per 100 pounds carload minimum, or such other rate as the Commission should deem just and reasonable; and also prayed that the Railway Companies should be required to pay it reparation for the said unlawful charges in the sum of $1732.54 or such sum as the Commission should find the complainant entitled to under the evidence. The Railway Companies answered this complaint before the Interstate Commerce Commission, and denied in substance that the commodity rate of $4.00 per 100 pounds was unjust or unreasonable or that the sum of $2.50 per 100 pounds with the minimum of 10,000 pounds was a just or reasonable rate for the transportation of motorcycles; and they also denied that complainant had been overcharged in the sum of $1732.54 or in any sum whatsoever, or that complainant was entitled to any reparation.

The matter came on for hearing before the Interstate Commerce Commission and upon the evidence adduced thereon the said Commission on the 3rd day of February, 1914, made its report in writing (Transcript of record, page 24), in which it found in substance that the commodity rate of $4.00 per 100 pounds charged and collected by the Railway Companies from Ballou & Wright for said service, was unjust, unreasonable and excessive to the extent that it exceeded the first-class rate in effect at the time the said shipments were made, and further found that the shipper was *damaged* to the extent of the difference between the said commodity rate and the first-class rate in effect at the time said shipments moved. In other words, the Interstate Commerce Commission found that when the shipments which were made on March 25,

1911, March 9, 1912, April 19, 1912, and May 1, 1912, the first-class rate then in effect of $3.00 per 100 pounds was a just and reasonable charge and should have been applied to motorcycles in carloads and that the commodity rate of $4.00 per 100 pounds charged and collected was unjust, unreasonable and excessive to the extent of the difference between the said commodity rate and the said first-class rate then in effect; and that when the shipments were made on July 3, 1912, August 22, 1912, and January 3, 1913, the first-class rate then in effect of $3.70 per 100 pounds was a just and reasonable charge and should have been applied to motorcycles in carloads, and that the commodity rate charged and collected was unjust, unreasonable and excessive to the extent of the difference between the said commodity rate and the said first-class rate then in effect; (Transcript of record, page 25); and subsequently and on the 14th day of August, 1914, the Commission made an order awarding to complainant reparation in the sum of $828.13 with interest from January 1, 1913, and apportioned the said sum between, and ordered that the same be paid by the group of Railway Companies over whose lines the said respective shipments of motorcycles were moved, and directed that the said several sums with interest as apportioned between the said Railway Companies should be paid to complainant on or before the 1st day of October, 1914.

The Railway Companies having declined to pay the said reparation as awarded, consignee, on the 3rd day of June, 1915, filed its complaint in the District Court of the United States for the District of Oregon, to recover from the said several groups of Railway Companies the said damages sustained by it in consequence of the violation of the provisions of the said Act, together with a reasonable attorney's fee, costs and disbursements (Transcript of record, pages 5-48). The said complaint after setting out in detail the point of origin of

the shipments and date thereof, waybill number and date thereof, car number and initial, carriers interested and route, and point of destination, weight and commodity rate charged, weight and first-class rate in effect at the time said shipments moved, the amount of reparation due based upon the first-class rate in effect at the time of said shipments, and the amount of overcharge, alleges in substance that the commodity rate of $4.00 per 100 pounds charged and collected by the Railway Companies was unjust, unreasonable and excessive, and that the first-class rate in effect at the time said shipments were made should have been applied to motorcycles in carloads, and that by reason of the said unjust, unreasonable and excessive rate charged and collected for said service, the petitioner, Ballou & Wright, suffered and sustained damages to the extent of the difference between the said commodity rate charged and collected and the reasonable amount which petitioner would have paid based upon the said first-class rate in effect at the time said shipments were made which should have been applied to motorcycles in carloads.

The Railway Companies answered this complaint and in substance denied that the said commodity rate charged and collected was unjust, unreasonable or excessive and denied that the said first-class rate in effect at the time said shipments were made was or is just or reasonable or that the same should have been applied to motorcycles in carloads; and for a further and separate answer and defense the Railway Companies alleged in substance that consignee in the management of its business, added an arbitrary sum of $15.00 to the sale price of each motorcycle to cover the difference between the said commodity rate charged and collected and the first-class rate in effect at the time said shipments were made, the amount of said reparation claimed as damages.

Consignee interposed a demurrer to this further and

separate answer and defense and the court suspended ruling on this demurrer until after the testimony was taken. Thereupon consignee filed a reply denying in substance all of the matters contained in the said further and separate answer.

A jury was waived by each of the respective parties, and the Railway Companies having admitted all of the proceedings before the Interstate Commerce Commission, including the report of the Commission and order authorizing reparation, consignee offered testimony upon the subject of what would be a reasonable attorney's fee in the event it should prevail, and rested.

Certain stipulations were made between counsel for the respective parties, the substance of which was that the only question for determination of the court under the evidence was the reasonableness or unreasonableness of the rates charged and collected and the measure of damages, if any, sustained by consignee. The Railway Companies then offered in evidence certain proceedings had and taken before the Interstate Commerce Commission, including the pleadings and testimony, and rested. (Transcript of record, page 111).

The court thereupon sustained the demurrer of consignee to the further and separate answer and defense of the Railway Companies and made findings of fact and conclusions of law in favor of consignee and against the Railway Companies in accordance with the order of reparation of the Interstate Commerce Commission and entered a judgment as prayed for with attorney's fees and costs. (Transcript of record, pages 80-96).

The Railway Companies sued out this writ of error to review this judgment. The sole question involved in this case is:

What under the evidence in this case is the measure of consignee's damages?

CONTENTIONS OF THE CARRIERS.

The carriers in their brief make eight different contentions, but when boiled down and considered in the final analysis, their contention is succinctly and correctly stated in the language of the witness, Mr. R. C. Fyfe, Chairman of the Western Classification Committee, in his testimony given before the Interstate Commerce Commission (Transcript record, page 173), which is as follows:

> "We further contend that the complainants are not entitled to any reparation or consideration on the past shipments on account of the fact that the freight paid has been *passed along* to the ultimate purchaser."

CONTENTIONS OF CONSIGNEE.

Ballou & Wright contends:

I.

In an action at law tried to the court, findings on facts have the same effect as a verdict of a jury, and are conclusive on appeal unless there is no evidence to support them; and the court's refusal to find other facts is as conclusive on appeal as its findings. Questions of fact determined on the weight of conflicting evidence in an action at law tried to the court without a jury are not reviewable. The Appellate Court is confined to determining whether the court below erred in the conclusions of law deduced by it from the facts found, and to reviewing errors of law committed as to the admission or rejection of testimony, when the action of the court in this

respect has been duly excepted to and the right to question the same has been properly preserved.

II.

The payment of freight charges, which, upon complaint of a shipper, or consignee, are subsequently found by the Interstate Commerce Commission to be unjust and unreasonable, is presumptive and sufficient evidence of damage to the shipper or consignee to the extent of the difference between the amount paid by him under such rate, and what he would have paid under the rate found by the Commission to be a just and reasonable rate for the service rendered and, in such case, the burden is upon the carrier to overcome such presumption by competent evidence and to show that such difference is not the proper measure of damages.

III.

There can be no abatement of damages on the principle of compensation received for loss or injury, where it comes from a collateral source wholly independent of the party causing the damages, and which is as to him *res inter alios acta.*

IV.

Where a shipper or consignee has paid unjust and unreasonable charges for the transportation of freight he may recover as reparation or damages the difference between such unjust and unreasonable charges paid, and what is found to be just and reasonable charges for such service, even though such unjust and unreasonable charges were added to the selling price of the property transported, and even though he may not ultimately be damaged by the payment of a higher rate.

V.

If the judgment of the lower court should be affirmed consignee should be allowed upon this writ of error a reasonable attorney's fee to be taxed as a part of the costs.

POINTS AND AUTHORITIES

I.

IN AN ACTION AT LAW TRIED TO THE COURT, FINDINGS ON FACTS HAVE THE SAME EFFECT AS A VERDICT OF A JURY, AND ARE CONCLUSIVE ON APPEAL UNLESS THERE IS NO EVIDENCE TO SUPPORT THEM; AND THE COURT'S REFUSAL TO FIND OTHER FACTS IS AS CONCLUSIVE ON APPEAL AS ITS FINDINGS. QUESTIONS OF FACT DETERMINED ON THE WEIGHT OF CONFLICTING EVIDENCE IN AN ACTION AT LAW TRIED TO THE COURT WITHOUT A JURY ARE NOT REVIEWABLE. THE APPELLATE COURT IS CONFINED TO DETERMINING WHETHER THE COURT BELOW ERRED IN THE CONCLUSIONS OF LAW DEDUCED BY IT FROM THE FACTS FOUND, AND TO REVIEWING ERRORS OF LAW COMMITTED AS TO THE ADMISSION OR REJECTION OF TESTIMONY, WHEN THE ACTION OF THE COURT IN THIS RESPECT HAS BEEN DULY EXCEPTED TO AND THE RIGHT TO QUESTION THE SAME HAS BEEN PROPERLY PRESERVED.

Empire State-Idaho Mining & Development Co. vs. Bunker Hill & Sullivan Mining & Concentrating Company, 114 Fed. 417;

Los Angeles Gas & Electric Corporation vs. Western Gas Construction Co., 205 Fed. 707;

Washington & Canonsburg Railway Co. vs. Murray, 211 Fed. 440;

Nashville Interurban Railway vs. Barnum, 212 Fed. 634;

Busch vs. Stromberg-Carlson Telephone Mfg. Co., 217 Fed. 328;

Young vs. Amy, 171 U. S. 179.

II.

THE PAYMENT OF FREIGHT CHARGES WHICH, UPON COMPLAINT OF A SHIPPER OR CONSIGNEE, ARE SUBSEQUENTLY FOUND BY THE INTERSTATE COMMISSION TO BE UNJUST AND UNREASONABLE, IS PRESUMPTIVE AND SUFFICIENT EVIDENCE OF DAMAGE TO THE SHIPPER OR CONSIGNEE TO THE EXTENT OF THE DIFFERENCE BETWEEN THE AMOUNT PAID BY HIM UNDER SUCH RATE, AND WHAT HE WOULD HAVE PAID UNDER THE RATE FOUND BY THE COMMISSION TO BE A JUST AND REASONABLE RATE FOR THE SERVICE RENDERED AND IN SUCH CASE THE BURDEN IS UPON THE CARRIER TO OVERCOME SUCH PRESUMPTION BY COMPETENT EVIDENCE AND TO SHOW THAT SUCH DIFFERENCE IS NOT A PROPER MEASURE OF DAMAGES.

Southern Pacific Company vs. Goldfield Consolidated Milling & Transportation Company, 220 Fed. 14;

Darnell-Taenzer Lumber Company vs. Southern Pacific Company, 221 Fed. 890;

Meeker vs. Lehigh Valley Railroad Company, 236 U. S. 412;

Mills vs. Lehigh Valley Railroad Company, 238, U. S. 473.

In the case of Southern Pacific Company vs. Goldfield Consolidated Milling & Transportation Company, 220 Fed. 14, the plaintiff filed with the Interstate Commerce Commission a complaint against the railway companies alleging that it had been charged an unreasonable rate for the transportation of a carload of window sash from Youngstown, Ohio, to Goldfield, Nevada, and asking reparation. It was alleged in the complaint that the rate of $3.44 per 100 pounds, published and charged by the carriers for transporting that commodity between the points mentioned, was unreasonable, and praying that an order be entered by the Commission declaring $1.95 was a reasonable rate for such service and that the carriers be required to make their charge on that basis. *After the hearing before the Interstate Commerce Commission it rendered its decision holding that the rate complained of was unreasonable, and that the rate of $1.95 was a reasonable rate for the service,* and entered an order directing the carriers to publish the latter rate for such transportation, *and found that the complainant in that proceeding was entitled to an award for reparation against the Southern Pacific Company and the Tonopah & Goldfield Railroad Company in the sum of $447, with interest and ordered the said railway companies to pay said sum with interest to the complainant.* The railway companies having refused to pay the reparation as ordered by the Commission, the plaintiff commenced an action in the court below to recover the amount of such award. The railway companies in their answer set up that among other things that no evidence was introduced or offered and none heard by it, sufficient to justify its findings and decision. Upon the trial the plaintiff introduced in evidence the findings, conclusions and order of the Interstate Commerce Commission, and also exhibits. The railway companies offered no evidence except the transcript and exhibits which were before the Interstate Commerce

Commission. The trial court ordered a judgment in favor of the plaintiff for the amount of reparation awarded by the Interstate Commerce Commission and for costs. From that judgment a writ of error was taken and Judge Ross in rendering the opinion of this court at page 18, said:

> *"The fact that the defendant in error was damaged in the particulars specified, as well as the extent of such damage, was therefore expressly found by the Commission in the present case; and that finding of facts, like all other facts found by it, is, by the Interstate Commerce Act* of February 4, 1887, as amended by the acts of March 2, 1889, and June 29, 1906 (24 Stat. c. 104, 25 Stat. c. 382, and 34 Stat. c. 3591 Comp. St. 1913, Sec. 8584), *expressly made prima facie evidence. Being introduced by the plaintiff on the trial in the court below, and there being nothing in any of the other evidence given on the trial in conflict therewith, it must be here taken that the plaintiff in the case was damaged by the unlawful act of the defendants below, plaintiffs in error here, to the extent and in the amounts for which the court gave judgment."*

The case of Darnell-Taenzer Lumber Company vs. Southern Pacific Company, 221 Fed. 890, was an action brought by plaintiff and seven other lumber companies vs. Southern Pacific Company and twenty-five other railroads for the amount of reparation to which each plaintiff was entitled as against the respective railroad companies as awarded by the Interstate Commerce Commission. The railroad companies in answer to the complaint pleaded as their defense that the rate charged was not an unreasonable rate; and that the plaintiffs had not been damaged. Upon trial plaintiff put in evidence both reports and both orders of the Commission original and supplemental. There was also oral testimony on the

plaintiffs' part on the subject of damages; and testimony pro and con as to the reasonableness of the charges. At the close of the trial a verdict was directed for the railroad companies. This was assigned as error. In discussing this subject Knappen, Circuit Judge, in rendering the opinion of the court at page 891, said:

> "The direction of verdict is here defended on the ground of utter lack of evidence that plaintiffs suffered damages. This contention involves the propositions: (1) That the reports and orders of the Commission are not prima facie evidence of damages or of the measure thereof; and (2) that both the facts found by the Commission and the oral evidence show that plaintiffs were not damaged.
>
> "(1) *Since this case was brought here the Supreme Court, in the cases of Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412,* 35 Sup. Ct. 328, 59 L. Ed.— and Id. 236, U. S. 434, 35, Sup. Ct. 337, 59 L. Ed.— *has held that the prima facie evidential effect given by the statute to 'the findings and orders of the Commission' includes the findings upon the questions 'whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages.' Under the decisions in the Meeker cases, it is clear that the original and supplemental reports of the Commission considered together amount to a finding that the shippers were damaged by the excessive and unreasonable freight rates in question, and in the respective amounts stated in the reports and orders; in other words, that the amounts awarded represent the actual pecuniary loss of the respective plaintiffs. Unless, therefore, the facts found by the Commission, or the oral evidence presented at the trial, conclusively overcome the prima facie effect of the Commission's ultimate findings as to the fact and amount of damages, the direction of verdict was plainly erroneous.*
>
> "(2) *The Commission's report states* that the

amount of lumber shipped West from the points of origin here concerned is insignificant in comparison with the total amount handled on the Coast, and that the price of lumber so shipped is little influenced by Coast prices; *that shippers in Memphis have charged substantially the same price, whether 'sales were in the East or for export, or for shipment to California;' and that thus 'the advance in the freight rate has been added to the price paid by the consumer.' Defendants insist that this situation conclusively negatives the existence of pecuniary loss by the shippers. The Commission replied to this contention that it was impossible to say to what extent 'complainants may have been actually damaged by the advance in this rate, if the word "damage" is to be interpreted and applied as claimed by the defendants.'* The Commission, however, speaking through Commissioner Prouty, declined to accept defendant's interpretation of damage, saying:

"'*These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay.*'

"In Nicola, etc., Co. v. L. & N. Ry. Co., 14 Interst. Com. Com'n R. 199, 208, the Commission, speaking through Commissioner Clements, in reply to the carrier's contention that the consumer alone was damaged by the payment of the excessive freight charges, said:

"'The suggestion * * * would, if followed, lead the Commission away from the direct results of the act of the carrier in the establishment and exaction of an unjust rate into the domain of indirect and remote consequences and perhaps into questions of equity between the vendor and vendee of the

lumber. The vendor sells the lumber for the best price he can get, and the vendee buys at as low a figure as he can. The price which the one is able to get and the other must pay is of necessity fixed or controlled by many influences, including, of course, the transportation charges. * * *

"We do not understand that the act to regulate commerce contemplates or authorizes the application by the Commission of its provisions in respect to reparation on account of unreasonable rates in such manner. Whatever a court of equity might be able to do and be justified in doing in dealing with the relations between vendor and vendee of the lumber in reference to the rates or other considerations, the Commission is confined in the making of awards for reparation to the injury or damage sustained by those who are the real and substantial parties at interest in the transaction in which such transportation charges have been made. The reparation is due to the person who has been required to pay the excessive charge as the price of transportation. It follows that we must, in making orders of reparation in these cases, upon proper proof of the shipments, make such orders in favor of those who paid the charges as freight charges, or on whose account the same were paid, and who were the true owners of the property transported during the period of transportation.

"See, also, Kindelon v. Railway Co., 17 Interst. Com. Com'n R. 251, 254, 255. And the Commission did not regard its findings on the subject of reparation as merely tentative, but as requiring:

" 'That degree of certainty and satisfactory conviction in the mind and judgment of the Commission as would be deemed necessary under the well-established principles of law as a basis for a judgment in court.' Anadarko Cotton Oil Co. v. Atchison, T. & S. F. R. R. Co., 20 Interst. Com. Com'n R. 43, 51.

"Since the foregoing decisions of the Commission the Supreme Court has held, in a case involving dis-

crimination in rates as between competing shippers, that the damages, recoverable by the shipper against whom the discrimination is practiced, must be proved; that the damages are not necessarily measured by the difference between the published rate paid by the complaining shipper and the lower rate given to a more favored shipper, but may be more or less than such difference. Penna. R. R. Co., v. International Coal Co., 230 U. S. 184, 203, 33 Sup. Ct. 893, 57 L. Ed. 1446. *While the Commission applies this rule in discrimination cases* (New Orleans Bd. of Trade v. Illinois Central R. R. Co., 29 Interst. Com. Com'n R. 32; Spiegle v. Southern Ry. Co. 32 Interst. Com. Com'n R. 687) *it has never in cases of purely unreasonable and excessive rates departed from the rule announced in the Burgess case.* A few of the many cases, subsequent to the International Coal Co. case, in which the rule in the Burgess case has been applied by the Commission are cited in the margin. While the Supreme Court in the Meeker cases reaffirmed the rule that damages in reparation cases must be proved, that court, so far as we have seen, has not passed directly upon the proposition involved in the Burgess case and in the instant case; the nearest approach thereto being *the holding in the Meeker cases that the Commission did not apply "an erroneous or inadmissible measure of damages" in finding that the shippers were damaged to the extent of the difference between what they actually paid and what they would have paid under a reasonable rate.* In the Meeker cases no evidence of damages was presented except the Commission's findings, and the evidence on which the Commission acted did not appear.

"We find nothing in either the International Coal Co. case or the Meeker cases conflicting with the view that damages resulting from the imposition of unreasonably excessive rates are normally measured by the difference between the rate charged and a reasonable rate. Cases of excessive and unreasonable rates differ from discriminating charges in the fact

that in the latter there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to someone else. On the other hand, the charging of an excessive and unreasonable rate is ipso facto unlawful.

"We think the payment by the shipper of excessive and unreasonable freight charges naturally imports legal damage to the shipper therefrom, and that the rule as to the measure of damages applied by the Commission is a reasonable interpretation of the statute as applicable to reparation cases, to the extent of making payment of unreasonably excessive freight charges presumptive evidence of damage to the shipper to the extent of such excessive charges, and that the presumption of damage afforded by such payment can not be overcome by anything short of definite proof—not resting upon uncertainty or conjecture—negativing the fact or the amount of damage. As said by the Commission in its first report in the Burgess case (13 Interst. Com. R. at page 680):

" 'If complainants were obliged to follow every transaction to its ultimate result, and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them.'

"In our judgment a rule requiring the shipper to mathematically demonstrate that it was actually pecuniarily damaged to the amount of the unreasonable excess in rates so paid would effectually emasculate the reparation provision of the Interstate Commerce Act. We therefore think it clear that the Commission's statement that the excessive freight rate had been added to the price paid by the consumer did not, as matter of law, and in view of the other considerations referred to by the Commission, overcome the prima facie effect of the findings that plaintiffs were damaged to the extent of such excessive freight rate actually paid by them."

The case of Meeker vs. Lehigh Valley Railroad Company, 236 U. S. 412, was an action under Section 16 of the Act to Regulate Commerce, to recover from the Lehigh Valley Railroad Company damages alleged to have been sustained by shipper and awarded by the Interstate Commerce Commission by reason of the company's violation of the prohibition in Sections 1 and 2 of that Act against unreasonable rates and unjust discrimination. The plaintiff prevailed in the District Court, but the Circuit Court of Appeals reversed the judgment (211 Fed. 785) and the case was taken on a writ of certiorari to the Supreme Court of the United States. The Supreme Court in discussing the force and effect to be given to the reports and orders of the Interstate Commerce Commission in this case at page 429, said:

> "*But it is said that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award.* What the reports really disclose is that the Commission 'upon consideration of the evidence adduced upon the hearing upon the question of reparation' found (a) that by reason of the unjust discrimination resulting from giving the rebate to the Lehigh Valley Coal Company, Meeker & Company were 'damaged to the extent of the difference' between what they actually paid from November 1, 1900, to August 1, 1901, and what they would have paid had they been dealt with on the same basis as was the coal company; and (b) that by reason of being charged an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, Meeker & Company were 'damaged to the extent of the difference' between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable. *In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages. The Commission was authorized*

and required by Sec. 8 of the act to regulate commerce to award 'the full amount of damages sustained,' and that, of course, was to be determined from the evidence. If it showed that the damages corresponded to the rebate in one instance and to the overcharge in the other, the claimant was entitled to an award upon that basis. The case of Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. Rep. 893, *is cited as holding otherwise, but it does not do so.* There a shipper, without proving that he sustained any damages, sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to Sec. 8, said (p. 203): 'The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered. Whatever they were they could be recovered.' There is nothing in either report of the Commission which is in conflict with what was said in that case. On the contrary, *the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it.''*

III.

THERE CAN BE NO ABATEMENT OF DAMAGES ON THE PRINCIPLE OF COMPENSATION RECEIVED FOR LOSS OR INJURY, WHERE IT COMES FROM A COLLATERAL SOURCE WHOLLY INDEPENDENT OF THE PARTY CAUSING THE DAMAGES, AND WHICH IS AS TO HIM RES INTER ALIOS ACTA.

Sutherland on damages, Sec. 158;
Sedgwick on damages, Sec. 67;

Regan vs. New York & New England R. R. Co. 60 Conn. 124;

Western & Atlantic Railroad vs. Meigs, 74 Ga. 857;

Nashville, Chattanooga & St. Louis Ry. Co. vs. Miller, 120 Ga. 453;

Sherlock vs. Alling Adm'r., 44 Ind. 184;

Perrott vs. Shearer, 17 Mich. 48;

Dillon vs. Hunt, 105 Mo. 154;

Cornish vs. North Jersey Street Ry. Co., 73 N. J. L. 273;

Hammond vs. Schiff, 100 N. C. 161;

Cameron vs. Pacific Lime & Gypsum, 73 Or. 510;

Coulter vs. Township, 164 Pa. St. 543;

Harding vs. Townshend, 43 Vt. 537;

Clune vs. Ristine, 94 Fed. 745;

Brebham vs. Baltimore & Ohio R. R. Co., 220 Fed. 35;

The Propeller Monticello vs. Mollison, 17 How. 152;

Hall & Long vs. R. R. Co's, 13 Wall. 367;

Chicago, St. Louis & N. O. Railroad vs. Pullman Southern Car Co., 139 U. S. 79.

The case of Regan vs. New York & New England Railroad Company, 60 Com. 124, was an action to recover damages for the loss of goods belonging to the plaintiff, which were destroyed by a fire communicated by a locomotive engine belonging to and in the use of the defendant corporation. At the trial counsel for the defendant inquired of the plaintiff as a witness, if he had not received from the insurance companies some compensation for the damages to said goods by said fire. This question was objected to by plaintiff and excluded by the

court. Upon appeal the court in passing upon the admissibility of this question at page 129, said:

> "But irrespective of the pleadings, the ruling complained of was clearly right upon the merits of the question. Any other conclusion would seem to us utterly at variance with established principles and sound reason, and contrary to an unbroken line of decisions by the courts of England and the United States.
>
> "If the defendant is entitled to have the insurance money deducted from the amount otherwise due, it must be because it owns or has some legal claim to the money. How happens it that the defendant corporation is entitled to this money? Not because it ever paid the premium or any part of it, nor because the policy was obtained for its benefit or upon its request, nor because there is any privity between it and the insurance company. * * *
>
> "The defendant, instead of paying anything toward procuring the policy, by its extraordinary use of the dangerous element of fire in close proximity to the plaintiff's property, rendered it necessary for him to pay a much larger sum to obtain his insurance than would otherwise have been required.
>
> "How then can the defendant claim, as it does, the exclusive benefit of the insurance? It came to the plaintiff from a collateral source, wholly independent of the defendant, and which as to him was "*res inter alios acta.*" The defendant, in our judgment, has no more claim to the insurance money than it would have to money obtained upon a subscription paper which the friends of Regan may have procured to make good his loss. How can the defendant make any distinction between money raised voluntarily after the loss and that obtained from a contract of indemnity to which it was no party and had paid no part of the consideration?
>
> "*The statute upon which the action is founded justly imposes an absolute primary liability on the defendant for having caused the loss. But the ruling*

which the defendant asked for would completely nullify the statute as applicable to such a case as this, by practically imposing the primary obligation on the insurer who is innocent, and allowing the defendant, who caused the loss and who alone could have prevented it, to go entirely free, at least to the extent of the insurance.

"If the principles that underlie the defendant's position are correct, had the loss been paid in full in ignorance of the fact that the plaintiff had obtained insurance, the defendant might bring a suit against the plaintiff to recover the money so paid; or had the money due on the policy not been paid, the defendant, after paying the loss in full, could intervene to prevent the amount due on the policy from being paid to the insured or any other than itself. *What a strange subrogation that would be, to put the party who caused the loss in the place of the insured to enforce the contract between the latter and his insurer! And what a strange revolution would be made in the relation of the parties were we to adopt the defendant's contention! It has hitherto been established by a line of decisions reaching backward more than a century and substantially unbroken by dissent, that there is no privity in such cases between one made primarily liable for such a loss and an insurance company.*"

The case of Sherlock vs. Alling, Adm'r., 44 Indiana 184, was an action to recover damages for the death of one Sappington. The defendants in their answer set up in bar of a part of the damages claimed by plaintiff, an insurance of $3000.00 on the life of Sappington for the benefit of his widow and children which had been paid. A demurrer was interposed to this part of the answer and sustained. Upon appeal the court at page 199 said:

"The sixth paragraph of the answer raises the question, whether the receipt of a sum of money by the persons for whose benefit the action is prose-

cuted, on account of a policy of insurance on the life of the deceased, can be shown to reduce the amount of the recovery. The argument urged in support of the position is, that the damages are recoverable for the death, and when that death brings money, which might not otherwise come to the party, a pecuniary benefit to the extent of the amount received has accrued to the party from the death; that if the wrongful act causing the death, has been the occasion of pecuniary benefit, the pecuniary damage can not be ascertained without deducting from the whole damage the pecuniary benefit. *If the argument is sound, it would apply to a case where the pecuniary benefit resulted by descent or devise. It proposes to use, as a defense to damages resulting from the wrongful act of the defendants, by way of set-off, recoupment, or in mitigation of such damages, pecuniary benefits received by the injured party, to which the defendants have not contributed, and not resulting from, or connected with, the act causing the death—benefits which it is fair to presume would have been realized at a future day without the aid of their wrongful act. To allow such a defence would defeat actions under the law, when the party killed had, by his prudence and foresight, made provision or left means for the support of his wife and children, and the wrong-doer would thus be enabled to protect himself against the consequences of his own wrongful act.''*

The case of Perrott vs. Shearer, 17 Michigan 48, was an action of trespass against the defendant, who was a sheriff, for seizing and taking certain goods of the plaintiff. It appears that the goods while under the control of the defendant in pursuance of the attachment levied were accidentally destroyed by fire. The plaintiff held at the time insurance policies upon the goods to their full value and after the fire, presented to the insurance companies proofs of their loss and received pay therefor. Upon this state of facts it was claimed by the de-

fendant that plaintiff's position was the same as if he had repossessed himself of the goods by replevin; and that he was entitled to recover damages only for their detention up to the time of the fire. The trial court denied this claim of the defendant and instructed the jury that the plaintiff was entitled to recover the full value of the goods and plaintiff was given judgment for their value accordingly. Upon appeal, Cooley, Chief Justice, at page 56, said:

> "It certainly strikes one, at first, as somewhat anomalous that a party should be in position to legally recover of two different parties the full value of goods which he has lost; but we think the law warrants it in the present case and that the defendant suffers no wrong by it. *He is found to be a wrongdoer in seizing the goods, and he can not relieve himself from responsibility to account for their full value, except by restoring them. He has no concern with any contract the plaintiff may have with any other party in regard to the goods, and his rights or liabilities can neither be increased nor diminished by the fact that such a contract exists.* * * * The plaintiff recovers of the defendant for the wrong that has been done him in taking his goods; and he recovers of the insurance company a large sum for a small outlay, because such payment was the risk they assumed, and for which they were fairly compensated. *It is not a question of importance in this inquiry, whether the act of the defendant caused the loss or not—his equitable claim to a reduction of damages, if he could have any, would spring from the fact that the plaintiff recovers pay for his property twice; but the answer to that is that he recovers but once for the wrong done him, and he receives the insurance money upon a contract to which the defendant is in no way privy, and in respect to which his own wrongful act can give him no equities.*"

The case of Harding vs. Townshend, 43 Vermont, page 536, was an action on the case for damages sustained by plaintiff by reason of an insufficiency of a highway of the defendant. The sole question in this case was the amount of damages which plaintiff was entitled to recover. The plaintiff was a witness, and on cross-examination the defendant asked him if he had not received money from an accident insurance company on account of the injuries for which he claimed to recover, to which the plaintiff objected, but the court overruled the objection and permitted the inquiry to be put and answered, to which the plaintiff excepted. The plaintiff answered that he had received $130.00 and that the expenses of the insurance were $7.00. At the request of the defendant, the court charged the jury that the $123.00, the net proceeds of the insurance, should be deducted from the damages sustained by the plaintiff, to which the plaintiff excepted. Upon appeal the court in discussing this ruling and charge of the court at page 538 said:

> "There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defense, or enure to the benefit of the defendant. *The insurer and the defendant are not joint tortfeasors or joint debtors so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer so as to give the former a right to avail itself of a payment by the latter.* * * *
>
> "But it is urged, on the part of the defense, that the plaintiff is entitled to but one satisfaction for the injury he has sustained. If we assume this to be a correct proposition, the question arises whether the defendant stands in a position to make this objection. This depends on the question who, as between the insurer and the defendant, ought to pay

the damage—which of the two ought primarily to make compensation to the plaintiff and ultimately to bear the loss? If the insurer ought ultimately to bear the loss, the defendant is entitled in this action to have the benefit of that payment; but if the defendant should ultimately bear the loss, then the payment by the insurer and the collection of the entire damage of the defendant only creates an equity between the plaintiff and the insurer, to be ultimately adjusted between them, in which the defendant has no interest and with which he has no concern. *The statute imposes upon the towns severally the duty of keeping their highways in good and sufficient repair, and makes each town liable for any special damage happening to any person by reason of the insufficiency or want of repair of any highway in such town. The defendant is found liable in consequence of the breach of this duty. The defendant town, therefore, in respect to the injury the plaintiff has sustained, is the wrong-doer; and whether such by some positive, affirmative act, or by culpable negligence, does not vary the principle applicable to the case. In such case, as between the insurer and the wrong-doer, in reason and justice the burden of making compensation to the injured party ought to be ultimately borne by the party thus in fault. The party whose wrongful act or culpable negligence caused the injury ought to make compensation and bear the loss. Therefore, if there is any such connection between these two remedies as to have the enforcement of one operate in defense or mitigation of the other, it is the insurer, and not the town, that should be entitled to this benefit. It would seem to be a perversion of justice to subrogate the wrong-doer, who has caused the loss, to the rights of the injured party as to his remedy against the insurer.''*

The case of The Western and Atlantic Railroad vs. Meigs, 74 Georgia, page 857, was an action to recover damages for a death of a husband. The trial court was requested to instruct the jury that if they found from the

evidence that plaintiff received life insurance money upon the death of her husband they might consider the amount so received and what income it was producing, in arriving at the amount of damages. Upon appeal the court at page 867 said:

> *"Damages to which a widow is entitled from a railroad company for the homicide of her husband should not be reduced by the amount of insurance paid to her on his life. If her recovery could thus be reduced, it might be insisted that, where the husband's life was insured for more than she was allowed to recover under the law as its actual cash value, the company could claim a balance against the family of the deceased, on the idea that the killing of the husband and father was a positive pecuniary benefit to them."*

The case of Nashville, Chattanooga and Saint Louis Railway Company vs. Miller, 120 Georgia, page 453, was an action brought by a railway mail clerk to recover damages against the railroad company for injuries received as the result of a collision between the train upon which he was working and another train. The trial court instructed the jury as follows: "It is immaterial whether the Government paid the plaintiff anything or not; that would not affect the rights of the plaintiff in this case to recover against the railroad company." The railroad company requested the court to instruct the jury as follows: "Plaintiff admits in his testimony that he received from the Government his regular salary during the time he did not work on account of his injury. This being so, I charge you that he can not recover anything on this account for time lost as claimed in his declaration." The railroad company assigned as error the giving of the former charge and the refusal to give the latter. Upon appeal the court in discussing this assignment of error at page 455 said:

"In considering whether the assignments of error under consideration are well taken it is necessary to determine whether the payment referred to in the testimony was of such a character as to preclude the plaintiff from claiming compensation for lost time against the railway company. *When one engaged in any calling or vocation, from which he derives a pecuniary benefit, is compelled to give up, for a time, the performance of his duties, as the result of an injury inflicted upon him by a wrong-doer, he is entitled, as a general rule, to demand compensation from the time thus lost at the hands of the wrong-doer who inflicted the injury. The general rule is, that where a wrong-doer causes time to be lost, he will not be heard to say that the person injured has suffered no pecuniary loss, because he has received, as a direct result of being injured, contributions which in amount aggregate more than what would have been earned during the time; nor will his liability be diminished to the extent of contributions which were less than what would have been earned. If from motives of affection, philanthropy, or as the result of a contract, the plaintiff has received from one other than his employer any sums the reception of which is directly attributable to the fact that he has been injured, the person causing the injury will not be allowed to urge the payment of such sums in mitigation of the damages claimed against him.*"

The case of Clune vs. Ristine, 94 Fed. 745. was an action against Ristine as receiver of the Colorado-Midland Railroad Company, to recover damages for the death of a son of plaintiff. In the course of the trial the court permitted defendant to prove by way of mitigating damages which the plaintiff might recover, that she had collected from an insurance company, for the death of her son, the sum of about $2000.00, and for that reason was not entitled to recover to the full extent of

her loss. An exception was taken to the admission of this evidence. Upon appeal the court at page 749 said:

> "We think that the testimony should have been excluded, and that the objection thereto was well taken. *When an action is brought against a wrongdoer, he is not entitled to have the damages consequent upon the commission of his wrongful act reduced by proving that the plaintiff has received compensation for the loss from a collateral source wholly independent of himself.*"

IV.

WHERE A SHIPPER OR CONSIGNEE HAS PAID UNJUST AND UNREASONABLE CHARGES FOR THE TRANSPORTATION OF FREIGHT, HE MAY RECOVER AS REPARATION OR DAMAGES, THE DIFFERENCE BETWEEN SUCH UNJUST AND UNREASONABLE CHARGES PAID, AND WHAT IS FOUND TO BE JUST AND REASONABLE CHARGES FOR SUCH SERVICE, EVEN THOUGH SUCH UNJUST AND UNREASONABLE CHARGES WERE ADDED TO THE SELLING PRICE OF THE PROPERTY TRANSPORTED, AND EVEN THOUGH HE MAY NOT ULTIMATELY BE DAMAGED BY THE PAYMENT OF A HIGHER RATE.

Burgess v. Transcontinental Freight Bureau, 13 I. C. C. 668;

Kindelon v. Southern Pacific Company, 17 I. C. C. 251;

Michigan Hardwood Mfg'r. Ass'n. v. Freight Bureau, 27 I. C. C. 32;

Ballou & Wright v. N. Y., N. H. & H. R. R. Co., 34 I. C. C. 120;

Pilcher Hardware Co. v. C. & N. W. R. R. Co., 37 I. C. C. 542.

In the case of Burgess vs. Transcontinental Freight Bureau, 13 I. C. C. 668, complaint was made before the Interstate Commerce Commission that the rate charges as paid by the shippers were unjust and unreasonable and reparation was claimed. The railway companies contended that the complainants should not be awarded reparation even though the Commission was of the opinion the rate charges were and had been excessive, for the reason as alleged that no damage upon the part of the complainants had been established. The Interstate Commerce Commission in passing upon this question at page 679 said:

> "The complainants claim reparation by reason of shipments made under the 85-cent rate. The defendants deny that the complainants should be awarded such reparation, even though the Commission be of the opinion that that rate is and has been excessive, for the reason that no damage upon the part of the complainants has been established.
>
> "This case shows that hardwood lumber has moved to the Pacific Coast in larger quantities since the rate was advanced in 1904 than it did previously. The use of hardwood upon the Pacific Coast has very much increased. Importations from foreign countries have been greater and shipments from the East have also grown. The amount of lumber sent West from these points of origin is insignificant in comparison with the total amount handled, and the price is but little influenced by the market upon the Pacific Coast. The dealer in Wisconsin or at Memphis has charged substantially the same price whether his sales were in the East or for export or for shipment to California, and this means, of course, that the advance in the freight rate has been added to the price paid by the consumer. The defendants say that it follows that the complainants who have paid this freight rate have not actually been injured.

"It appeared that one witness suspended operations upon the Pacific Coast owing to the advance in the rate, and other witnesses were of the opinion that more lumber would have been sold under the 75-cent rate. It is impossible to say, therefore, to what extent these complainants may have been actually damaged by the advance in this rate, if the word damage is to be interpreted and applied as claimed by the defendants.

"Such is not, in our opinion, the proper meaning of this term. *These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity transported.*"

In the case of Kindelon vs. Southern Pacific Co., 17 I. C. C. 251, the complaints of the shippers involved the reasonableness of rates for the transportation of hardwood lumber in carloads from various points along and west of the Mississippi River to San Francisco, California, and other Pacific terminals. The complainants asked for reparation. The railway companies in that case also contended that complainants had not shown damages. The Commission at page 254 said:

"The defendants further contend that the complainants herein have not shown that they were damaged. *It is well settled that reparation in any given case is due the person who has been required to pay an unlawful charge as the price of transportation. the shipper who has been charged an unlawful rate and who is the owner of goods transported is entitled to repayment without the imposition of the impossible task upon the Commission of ascertaining the ultimate profits accruing from the business of the shipper. Moreover, the owner of the freight who has been required to pay an unreasonable rate is entitled, upon proper complaint and showing, to reparation irrespective of the profits accruing from his business.*"

The case of Ballou & Wright vs. N. Y., N. H. & H. R. R. Co., 34 I. C. C. 120, is similar to the instant case. In that case the establishment of reasonable rates was asked and reparation to the extent that the commodity rates applied to the respective shipments exceeded the first-class rates contemporaneously in effect. The parties were the same and the same questions were involved as in this case. In that case the Commission at page 121 said:

"The case is similar to Ballou & Wright vs. N. Y., N. H. & H. R. R. Co., Docket No. 5616, in which the rates applied on similar shipments were found unreasonable and reparation was awarded. A copy of the transcript of testimony in that case was introduced in evidence in this proceeding, with certain additional evidence adduced to establish the fact of the shipments here involved. *The single question contested is complainant's right to reparation, defendants showing that complainant added an arbitrary sum of $15 to the sale price of each motorcycle to cover freight and local drayage charges, from which they argue that complainant suffered no damage and therefore is not entitled to reparation.* * * *

"Carriers can not be heard to say that reparation for the exaction of unreasonable freight rates should be denied because the shipper or consignee from whom the same has been collected has on that account secured a higher price for the commodity from his purchaser."

ARGUMENT.

That the commodity rate of $4.00 per 100 pounds charged and collected by the carriers was unjust, unreasonable and excessive and that the first-class rate contemporaneously in effect was a just and reasonable rate and should have been applied to motorcycles in carloads, stands admitted in this case.

Mr. R. C. Fyfe, Chairman of the Western Classification Committee, in his testimony before the Interstate Commerce Commission in this case testified as follows:

> "Our contention in this case is, that first-class rating, carload, being in effect in the territory in which the machines are manufactured, and which was established by the Commission in Opinion No. 2168, 26 I. C. C., page 127, and the fact that the manufacturers prayed to the Classification Committee for this rating, that first-class is reasonable and just and the classification should be permitted to apply on all of this traffic." (Transcript of record, page 173.)

The reduction to the first-class rate in the Western Classification referred to by Mr. Fyfe was not effective or published until after the filing by Ballou & Wright of its complaint before the Interstate Commerce Commission. (Transcript of record, p. 177.)

The Railway Companies in their brief admit that the

commodity rate charged Ballou & Wright was unjust and unreasonable and that the first-class rate contemporaneously in effect was reasonable when they say:

> "The sole question for decision is:
> "What is the measure of the damage recoverable * * * in cases arising out of the violation of Section 1 of the Act, which requires all charges in respect to transportation to be just and reasonable and which prohibits unjust and unreasonable charges?" (Brief plaintiff in error, p. 24.)

But the Railway Companies contend in the first place that there is no evidence in this case showing that the payment by Ballou & Wright of the said freight charges, found and admitted to be unjust and unreasonable, caused it to suffer any damages.

The testimony before the Interstate Commerce Commission which was introduced by the Railway Companies upon the trial of the case below upon this subject is as follows:

C. F. WRIGHT.

Testified:

> Ballou & Wright is a distributor of motorcycles, bicycles, and automobiles with the head office in Portland and a branch office at Seattle, Washington. I am familiar with the shipments involved in this complaint. The freight charges were paid on these shipments by Ballou & Wright; and they were not charged back to the shipper. (Transcript of record, p. 162.)

> The carload shipments made by Ballou & Wright are confined to one brand, The Indian, manufactured by the Hendee Manufacturing Company, Springfield, Massachusetts. The average cost of the Indian motorcycle to Ballou & Wright is approximately $175.00 to $180.00; and the average weight of each machine is 330 pounds. (Transcript of record, page 163).

> In figuring the cost value of any article no matter whether it is a motorcycle or stove, or what it may be, the freight is always added. We have added to the price of our goods, freight, add it in any line of goods, no matter whether it be lamps, horns or anything else. The $15.00 which is added to the price includes all handling charges. (Transcript of record, page 169).
>
> This charge of $15.00 is not made for freight alone. A motorcycle that retails for $250.00 in the East retails by Ballou & Wright for $265.00. That is, the price that is tacked on; the customer don't ask how or where that price is arrived at and he is not told. We have to do that on account of the high freight charges. We have had to add to the price of motorcycle horns because we have had to pay excessive freight charges. A machine that we pay $180.00 for would retail for $265.00 and in the $15.00 we add the cost of handling. (Transcript of record, page 170).

Learned counsel for the Railway Companies in their brief cite a number of discrimination cases in which it is held that no recovery can be had without proof of actual pecuniary loss; and an ingenious effort is made on the part of counsel to apply the same rule as to the measure of damages and proof thereof in cases where the rates charged were unjust and unreasonable, as in cases where the carriers are guilty of unjust discrimination.

It is sufficient answer to say that it has been uniformly held by the courts of last resort that the rule as to the measure of damages in the two classes of cases is not necessarily the same.

In a case predicated upon unjust discrimination in rates the damages suffered, if any, is not always measurable by the exact difference in the rates, it may be more or less. Loss of profits resulting from unfair competition might be an important element in discrimination

cases; but in the instant case it conclusively appearing from the testimony of Mr. Fyfe, and the Interstate Commerce Commission as well as the lower court having found, that the commodity rate of $4.00 per 100 pounds charged and collected from Ballou & Wright on the shipments made by it was unjust and unreasonable to the extent it exceeded the first-class rate contemporaneously in effect, and it being admitted by the Railway Companies that the commodity rate charged and collected from Ballou & Wright was unjust and unreasonable and that the said first-class rate was a just and reasonable rate, the findings of the Interstate Commerce Commission as well as the findings of the lower court that Ballou & Wright was damaged in an amount equal to the difference between the amount paid by it under such unjust and unreasonable rate, and the amount it would have paid at the first-class rate contemporaneously in effect, is conclusive.

The findings of the Interstate Commerce Commission and the trial court that the said commodity rate charged and collected was unjust and unreasonable and that the first-class rate contemporaneously in effect was a just and reasonable rate and should have been applied to the said shipments made by Ballou & Wright, being admitted by the Railway Companies to be correct, then the only question which remained for the court to determine, was the amount of damages suffered and sustained by Ballou & Wright.

In the absence of any evidence to the contrary this was a mere matter of computation—the difference between the unjust and unreasonable rate charged and collected and what Ballou & Wright would have paid at the first-class rate contemporaneously in effect. If this was not the measure of Ballou & Wright's damages the burden was upon the Railway Companies to establish that fact.

This the Railway Companies attempted to do by showing that Ballou & Wright added an arbitrary sum of $15.00 to the sale price of each motorcycle to cover the excessive freight exacted from it by the Railway Companies; and the Railway Companies say to Ballou & Wright: "We admit that, in the first instance you were damaged to the extent of the difference between the unjust and unreasonable rate charged and collected and the first-class rate contemporaneously in effect, but you can not recover these damages because the overcharge and excess resulting in the difference of said rates, in the language of Mr. Fyfe, 'has been *passed along* to the ultimate purchaser.'" (Transcript record, page 173).

This doctrine has the merit, at least, of being novel, even though its effect, if put in practice, would be to tear up by the roots the ancient and hitherto unquestioned doctrine founded upon the maxims, *injuria propria non cadet beneficium facientis,* and *jus ex injuria non oritur.*

By Section 1 of the Act to regulate commerce, "Every unjust and unreasonable charge" for the transportation of property "is prohibited and declared to be unlawful."

In this case the carriers in their brief admit that the rates charged and collected from Ballou & Wright were unjust and unreasonable, but they say it can not recover damages by reason thereof because the excessive rate charged has been "passed along" to the ultimate purchaser. If this be true the prohibition in Section 1 of the Act to regulate commerce against unjust and unreasonable charges and declaring such charges unlawful, is of no force or effect whatever. If the argument of counsel for the carriers is carried to its logical conclusion, carriers might charge and collect any extortionate rate however unreasonable, and if the same was "passed along" to the ultimate purchaser there could be no recovery.

Such construction of the Act to regulate commerce would absolutely destroy its object and purpose.

Certainly the carriers can not contend that because the consignee "passed along" the excessive charge to the ultimate purchaser, they can invoke the doctrine of subrogation.

It is elementary that the doctrine of subrogation will not be applied to relieve a party from the consequences of his own unlawful act.

> Sheldon on subrogation, Sec. 44;
> Wilkerson vs. Babbett, 4 Dill. 208;
> Johnson vs. Moore, 33 Kan. 90;
> Guckenheimer vs. Angevine, 81 N. Y. 394.

Besides there is no privity between the carriers in this case and the ultimate purchaser. Assuming that the excessive rate charged and collected was "passed along" to the ultimate purchaser, by the addition of an arbitrary sum of $15.00 to the sale price of each motorcycle, the amount thus received was paid to Ballou & Wright from a collateral source wholly independent of the carriers and which, as to them was *res inter alios acta*. There is no privity between the carriers who are primarily liable to plaintiff for the damages sustained, and the ultimate purchaser. After the carriers charged and collected the unjust and unreasonable rates they had no concern with any contract subsequently made by Ballou & Wright with the ultimate purchaser to recoup its damages; and the rights and liabilities of the carriers could neither be increased nor diminished by the fact that such contract was subsequently made. As was well said in the case of Clune vs. Ristine, 94 Fed. 745, "When an action is brought against a wrong-doer he is not entitled to have the damages, consequent upon the commission of his wrongful act, reduced by proving that the plaintiff has received

compensation for the loss from a collateral source wholly independent of himself.''

If the carriers in this case are entitled to deduct from the damages the excessive charge ''passed along'' to, and paid by the ultimate purchaser, it would necessarily be upon the theory that they had a right of action for the excess thus ''passed along.'' If the rule invoked by the carriers is the test as to the proper measure of damages, then if the excess freight charges ''passed along'' to, and paid by, the ultimate purchaser exceeded the amount of the shipper's damage, the carriers by parity of reasoning would be entitled such excess.

To carry the syncretism of the Railways further, had the excessive freight charges been refunded by the Railways in ignorance of the fact that such charges had been *passed along* and paid by the ultimate purchaser, the Railway Companies might bring suit against Ballou & Wright to recover the money so refunded; or had the excessive freight charges not been ''passed along'' and paid by the ultimate purchaser, the Railway Companies after paying the same, could intervene to prevent the ultimate purchaser from paying the same to Ballou & Wright or to any other than themselves. Such a doctrine would relieve a party from the consequences of his own unlawful act.

Stripped of sophistry and refined reasoning the position of the Railway Companies, plainly stated, is,—they ask to have the damages consequent upon the commission of their own wrongful acts, reduced by proving that Ballou & Wright *passed along* the excessive freight charges, and collected the same from the ''ultimate purchaser.'' They attempt to mitigate and reduce the damages resulting from their own unlawful acts by monies arising from a contract subsequently entered into between Ballou & Wright and the ''ultimate purchaser.''

A contract with which the Railway Companies had no concern, and to which they were neither a party nor privy.

The argument on the part of the Railway Companies is specious but fallacious and if given any controlling force the effect would be to rehabilitate and put in operation the predatory maxim which prevailed prior to the enactment of the Interstate Commerce Act—"charge all the traffic will bear;" and upon complaint being made by the merchant or dealer the Railway Companies could say without fear or hindrance, "We admit that we have charged you a rate unjust, unreasonable and excessive, but you can not recover from us, because you have *passed it along* to the ultimate purchaser, the man in overalls at the end of the line will have to 'pay the freight.'"

Such a doctrine is monstrous and has no place in the annals of jurisprudence.

V.

IF THE JUDGMENT OF THE LOWER COURT SHOULD BE AFFIRMED, BALLOU & WRIGHT SHOULD BE ALLOWED UPON THIS WRIT OF ERROR A REASONABLE ATTORNEY'S FEE, TO BE TAXED AS A PART OF THE COSTS.

Act to Regulate Commerce, Section 16;
L. & N. R. Co. vs. Dickinson, 191 Fed. 705;
Mills vs. Lehigh Valley R. R. Co., 226 Fed. 812.

In the case of Louisville & N. R. Co. vs. Dickerson, *supra* the court at page 712 said:

> "Section 16 provides that, if in a suit against a common carrier to compel compliance with an order for the payment of money "*the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of*

the costs of the suit." Plaintiff asks an allowance on account of the appellate proceedings, in addition to the allowance made by the Circuit Court. We think it is competent to make such additional allowance if the case is brought within the commerce act. Defendant contends it is not so brought on the ground that the diversion was not a violation of any section of the act, on the authority of Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 208, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7. We think the authority cited does not apply to this case. There the action was against an initial carrier for the loss of goods by a connecting carrier. The attorney fee was claimed under section 8 of the act, which provides therefor in case of recovery against a carrier for doing anything prohibited or declared unlawful by the act, or omitting to do anything required thereby. The damage claim was held not to be in consequence of a violation of the Interstate Commerce Act. Here, as already said, the attorney fee is provided by section 16 in a suit for the reparation awarded by the Commission.

"We think the case is brought directly within section 16, and that the plaintiff should be allowed $100 additional attorney's fee on account of the proceedings under appeal to this court."

It is respectfully submitted that the judgment of the lower court should be affirmed and upon such affirmance the defendant in error should be allowed the sum of $250.00 as a reasonable attorney's fee to be taxed as a part of its costs upon this writ of error.

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